Intermec Technologies Corp. v. Palm, Inc. Doc. 145 Att. 1

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NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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GABRIEL KRA, on behalf of himself and all others similarly situated, Plaintiff, v. NETFLIX, INC. , a Delaware corporation; WAL-MART STORES, INC., a Delaware corporation; and WALMART.COM, USA, LLC, a Delaware corporation, Defendants.	Case No. CV 09 1499 **CLASS ACTION COMPLAINT WITH JURY TRIAL DEMAND**

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Plaintiff Gabriel Kra ("Plaintiff"), individually and on behalf of the Class described below, brings this action for treble damages and injunctive relief under Sections 1 and 2 of the Sherman Antitrust Act of 1890, 15 U.S.C. §§ 1-2, and Sections 4 and 16 of the Clayton Antitrust Act of 1914, 15 U.S.C. §§ 15 and 26, to recover treble damages and the costs of the suit, including reasonable attorneys' fees, and obtain injunctive relief for the injuries to the Plaintiff and members of the proposed Class resulting from Defendants' violations of the federal antitrust laws. The allegations set forth below are based upon personal knowledge with respect to Plaintiff's own acts and information and belief with respect to all other matters.

INTRODUCTION

1. On or about May 19, 2005, Netflix, Inc. ("Netflix") Wal-Mart Stores, Inc. (Wal-Mart Stores") and Walmart.com, USA, LLC ("Walmart.com"), a wholly owned subsidiary of Wal-Mart Stores, ("Defendants") entered into an agreement to divide the markets for the sales and online rentals of Digital Video Discs ("DVDs") in the United States ("Market Allocation Agreement") with the purpose and effect of monopolizing and unreasonably restraining trade in at least the online DVD rental market.

2. The meetings that led to the Market Allocation Agreement began a few months earlier, in January 2005, when Reed Hastings ("Hastings"), the Chief Executive Officer of Netflix, and John Fleming ("Fleming"), then the Chief Executive Officer of Walmart.com, met with each other to discuss the online DVD rental and DVD sales markets. At the time of their initial meeting and prior to their entering into the Market Allocation Agreement, Netflix and Walmart.com were direct competitors in renting DVDs online and each of the Defendants were potential competitors in selling new DVDs to consumers. By May 19, 2005, however, Netflix, Wal-Mart Stores and Walmart.com had entered into an agreement by which Walmart.com would stop competing with Netflix in the online DVD rental business and Netflix would promote the sales of new DVDs by Wal-Mart Stores and Walmart.com, and not sell new DVDs in competition with them.

3. Defendants' Market Allocation Agreement enabled Netflix to charge its customers higher subscription prices for the rental of DVDs than it otherwise could have. Since the time the Defendants entered into the Market Allocation Agreement, neither Wal-Mart Stores nor

Walmart.com has rented DVDs online and Netflix has not sold new DVDs. As a result of their contract, combination and conspiracy, as well as Netflix's unlawfully acquired and maintained market and monopoly power, Netflix overcharged Plaintiff, and millions of other similarly situated consumers. Netflix continues to do so.

4. As alleged below, this case is brought as a class action on behalf of all consumers in the United States who, during the period May 19, 2005, to the present ("Class Period"), paid a subscription fee to rent DVDs from Netflix ("Class"). Plaintiff and the Class seek redress in the form of treble damages for violations of the federal antitrust laws and a declaration that the Market Allocation Agreement is null and void.

JURISDICTION AND VENUE

5. This Court has original jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1337 (original jurisdiction over any claims arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies), because the Complaint alleges violations of the Sherman Act, 15 U.S.C. §§ 1 and 2, and Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26.

6. Venue is proper in this district under 15 U.S.C. §§ 15, 22, and 26, and 28 U.S.C. § 1391(b) and (c), because during the Class Period Defendants resided, had an agent, transacted business, maintained offices, or otherwise were found in this district, because a substantial portion of the affected interstate trade and commerce described herein has been carried out in this district, and because each Defendant is subject to personal jurisdiction in this district.

INTRADISTRICT ASSIGNMENT

7. Pursuant to Civil L.R. 3-2, this case should be assigned to the San Francisco Division because a substantial part of the events giving rise to the claims occurred within this division. Defendant Walmart.com is headquartered in San Mateo County.

THE PARTIES

8. Plaintiff Gabriel Kra is a resident of San Francisco, California. During the Class Period, Plaintiff subscribed to Netflix and paid subscription fees to rent DVDs for personal use. As a result of Defendants' unlawful conduct alleged herein, Plaintiff suffered injury.

9. Defendant Netflix, Inc. ("Netflix") is a Delaware corporation headquartered at 100 Winchester Circle, Los Gatos, California. Netflix's revenues exceed $1 billion annually. Through its website, www.netflix.com, Netflix rents DVDs directly to consumers throughout the United States. Throughout the Class Period, Netflix has dominated the online DVD rental market, accounting for approximately 75 percent of all such rentals in the United States.

10. Defendant Wal-Mart Stores, Inc. ("Wal-Mart Stores") is a Delaware corporation headquartered at 702 S.W. Eighth Street, Bentonville, Arkansas. Wal-Mart Stores' revenues exceed $300 billion annually, and Wal-Mart Stores is the largest retailer in the United States. Wal-Mart Stores is also the largest seller of new DVDs in the United States, accounting for over one-third of all such sales through both its brick-and-mortar stores and online via www.walmart.com. From 2002-2005, Wal-Mart Stores' wholly-owned subsidiary Wal-Mart.com, USA, LLC competed with Netflix in the online DVD rental market through the Wal-Mart DVD rental service.

11. Defendant Walmart.com, USA, LLC ("Walmart.com"), a subsidiary of Wal-Mart Stores, Inc., is a Delaware company with its headquarters at 7000 Marina Boulevard, Brisbane, California. Walmart.com is the online component of Wal-Mart Stores. Prior to the conspiracy alleged herein, Walmart.com was a leading competitor of Netflix in the online DVD rental market through the Wal-Mart DVD Rentals service. Walmart.com is ranked as the 14th largest online retailer in the United States and sells DVDs directly to consumers nationwide.

12. Certain other persons, firms, corporations and entities, the identities of which plaintiff is not currently aware of, have participated as co-conspirators with Defendants in the violations and conspiracies alleged in this complaint. In order to engage in the offenses charged and violations alleged herein, these co-conspirators have performed acts and made statements in furtherance of the antitrust violations and conspiracies alleged herein.

13. At all relevant times, each Defendant was and is the agent of each of the remaining Defendants, and in doing the acts alleged herein, was acting within the course and scope of such agency. Each Defendant ratified and/or authorized the wrongful acts of each of the Defendants. Defendants, and each of them, are individually sued as participants and as aiders and abettors in the improper acts, plans, schemes, and transactions that are the subject of this complaint. Defendants,

and each of them, have participated as members of the conspiracy or acted with or in furtherance of it, or aided or assisted in carrying out its purposes alleged in this Complaint, and have performed acts and made statements in furtherance of the violations and conspiracy.

INTERSTATE TRADE AND COMMERCE

14. The trade and commerce relevant to this action are the sales and rentals of DVDs in the United States.

15. During the Class Period, Plaintiff and members of the Class throughout the United States purchased and/or rented DVDs directly from Defendants.

16. Defendants' conduct has taken place within the flow of, and substantially affected the interstate commerce of, the United States. Specifically, during the Class Period, Defendants have sold and/or rented DVDs throughout the United States, involving hundreds of millions or billions of dollars in interstate commerce, and used the instrumentalities of interstate commerce, including interstate wires and the U.S. mail, to sell and/or to rent DVDs throughout the United States.

THE PRODUCT MARKET

17. DVDs, as defined herein, refer to Digital Video Discs or Blu-ray Discs containing commercially recorded entertainment programs for personal viewing. DVDs are the primary medium by which movies and other recorded entertainment are distributed in the United States. Revenues on DVDs far exceed those generated from box office receipts. DVDs are also a lucrative means for the distribution of previously-aired television programming.

18. Although Defendants' Market Allocation Agreement is *per se* illegal and requires no market definition, for any claims that might require a market definition, the relevant market is the market for the rental of DVDs by online subscription for delivery by mail ("Online DVD Rental Market").

19. In the Online DVD Rental Market, consumers pay a monthly subscription fee to an online service provider in order to rent DVDs. The Online DVD Rental Market is distinct from the traditional in-store DVD rental market and the two services are not interchangeable. With traditional in-store DVD rentals, consumers travel to a retail store, pay for the DVD on a per-DVD basis, and return the DVD within the allocated time period or incur late fees. Late fees are a large portion of

the revenue obtained in the traditional in-store DVD rental market. In contrast, there are no late fees or due dates in the Online DVD Rental Market.

20. Furthermore, in the Online DVD Rental Market, consumers generally pay a monthly subscription, which is independent from the number of DVDs the consumers actually rent in a month. In contrast, in other forms of DVD rentals, the consumer usually pays for each individual DVD rental. The pricing of online rentals is generally nationwide in scope and is not affected by local in-store prices and competition. Online DVD rental providers also generally offer additional services, such as movie reviews and customer-specific recommendations.

21. The Online DVD Rental Market is also distinct from the market for DVD sales. For example, the pricing of DVDs for retail sale and online DVD rentals is very different. The pricing of DVDs for sale at retail stores is based a great deal on the popularity of the DVD. Also, the motivation of consumers is different in the Online DVD Rental Market from that of consumers in the market for DVD sales. Purchasers of DVDs have a longer time frame to use the DVD than do renters of DVDs. DVD rentals are also of no use to consumers who want to give a DVD as a gift or wish to collect DVDs. In addition, DVDs sold at retail stores often have other distinguishing characteristics, such as packaging and special features that are not available with rentals. Finally, whether a DVD is new or used is not an issue in rental, but it is a significant factor in sales. Used DVDs are sold at a significant discount compared with new DVDs because they are less desirable to consumers.

22. Netflix dominated the Online DVD Rental Market at all times relevant to this Complaint. Netflix's approximate market share of the Online DVD Rental Market is 75%. As a result of this market share, Netflix has had, and continues to have, market and monopoly power in the Online DVD Rental Market.

23. Since the consummation of the Market Allocation Agreement, the Online DVD Rental Market has been virtually comprised of only two firms: Netflix and Blockbuster Online. Blcokbuster Online possesses nearly all of the remaining 25% of the market. A few minor firms share less than 2% of the market. During fiscal years 2005 through 2007 combined, Netflix earned nearly $4 billion in revenues and $1.3 billion in gross profit from renting DVDs to consumers.

24. There have been no significant market entrants in the more than three years since the announcement of the Market Allocation Agreement.

25. Wal-Mart Stores and its wholly owned subsidiary, Walmart.com, dominate the new DVD sales market. Together they hold an industry leading 40% of the domestic DVD sales market. During fiscal years 2005-2008 combined, they earned revenues in excess of $25 billion by selling DVDs to consumers. Both Wal-Mart Stores and Walmart.com benefit from the Market Allocation Agreement.

ANTI-COMPETITIVE CONDUCT

26. In 2004 and 2005, competition in the Online DVD Rental Market was greatly increasing. At that point in time, there were three major competitors: Netflix, Blockbuster Online and Walmart DVD Rentals. Netflix stock price was declining due to the increased competition.

27. In mid-2004, Netflix was charging $21.99 for its most popular subscription rental plan. Blockbuster Online charged only $19.99 for a comparable plan when it entered the market in August 2004. By November 2004, Blockbuster Online had reduced its price further to $17.49. Walmart DVD Rentals similarly reduced its prices during this time from $18.86 to $17.36. Faced with this increased competition, Netflix was forced to reduce its subscription plan price to $17.99 per month.

28. By January 2005, Blockbuster Online had reduced its price to $14.99. Walmart DVD Rentals had reduced its price to $12.97.

29. Competition was also increasing in the DVD sales market during this period. Netflix posed a serious threat to the large market share controlled by Wal-Mart Stores and Walmart.com because of its large subscriber base.

30. The meeting between Walmart.com's Chief Executive Officer, John Fleming, and Netflix's Chief Executive Officer Reed Hastings marked the beginning of these competitors' attempts to defeat the greatly increased competition in the Online DVD Rental Market and the market for DVD sales. The meeting occurred after Fleming phoned Hastings and invited him to dinner to discuss their companies' DVD sales and rental businesses. Fleming accepted the invitation and the two met sometime in January 2005. At that meeting and in the coming months, the two

reached an Agreement to allocate the DVD sales and rental businesses.

31. On a May 5, 2005 Netflix First Quarter Earnings Call with financial analysts, Hastings made clear the motive for Netflix to conspire with Wal-Mart Stores and Walmart.com:

> In terms of profitability over the coming years, the key issue is the number of major competitors. If there are only two major players, Blockbuster and Netflix, the profitability may be substantial like other two-firm entertainment markets. If, on the other hand, Amazon, Wal-Mart, Blockbuster and Netflix are all major competitors in online rental, then the profits would likely be small.... [T]he likely Case is [that] online rental becomes a two-firm market over the coming years.

32. On May 19, 2005, shortly after Fleming had been promoted to Chief Marketing Officer of Wal-Mart Stores, Defendants issued a joint press release that revealed the existence of the Market Allocation Agreement.

33. The news of the Agreement was featured in a number of newspapers and other publications.

34. Under Defendants' Market Allocation Agreement, Wal-Mart Stores and Walmart.com agreed to exit the Online DVD Rental Market in order to stop competing with Netflix in that market. In return, Netflix agreed not to enter the new DVD sales market and instead promote the DVD sales of Wal-Mart Stores and Walmart.com.

35. Defendants subsequently followed through on their Agreement. Beginning on May 19, 2005, Walmart.com exited the online rental business and encouraged its subscribers to transfer to Netflix. Walmart.com prominently placed a link to the Netflix website on its website, encouraging Walmart.com subscribers to transfer their subscriptions to Netflix. Defendants even offered Walmart.com subscribers the chance to use their current lower Walmart.com subscription rates for up to one year if they transferred their subscriptions to Netflix. Netflix, in return, encouraged its subscribers to buy their DVDs from Wal-Mart Stores and Walmart.com, both online and in mailings sent to its subscribers.

36. From the time of thirty days after the joint announcement of the Market Allocation Agreement, neither Walmart.com nor Wal-Mart Stores has participated in the Online DVD Rental Market, nor has Netflix entered the DVD sales market.

37. Defendants' Market Allocation Agreement eliminated Walmart.com from the Online

DVD Rental Market, and, thus, eliminated Walmart.com's downward pricing pressure. With competition reduced, both Blockbuster Online and Netflix quickly increased their prices. In July 2005, Blockbuster Online raised its subscription price from $14.99 to $17.99 per month, matching Netflix's price,

38. On August 8, 2005, during Netflix' next Earnings Call, Hastings stated: "[L]ast quarter we said online rental was shaping up to be a two-player market, and that is indeed what is happening."

39. Absent, the Market Allocation Agreement, Netflix had strong incentives to enter the DVD sales market and Walmart.com would not have had incentives to exit the Online DVD Rental Market.

ANTITRUST INJURY TO PLAINTIFF AND THE CLASS

40. Defendants' illegal, anti-competitive Market Allocation Agreement has, among other things:

a. eliminated one of the only significant competitors in the Online DVD Rental Market;

b. eliminated competition between Defendants;

c. enabled Netflix to acquire and maintain market and monopoly power in the Online DVD Rental Market; and

d. enabled Netflix to implement and maintain monopolistic and supra-competitive pricing in the Online DVD Rental Market.

41. During the Class Period, as a result of the alleged violations of the antitrust laws described herein, Plaintiff and the Class paid supra-competitive prices for monthly subscription fees to Netflix, higher than the prices they would have paid in the absence of the illegal contract, combination or conspiracy.

CLASS ACTION ALLEGATIONS

42. Plaintiff brings this action as a class action pursuant to Federal Rules of Civil Procedure 23(a), 23 (b)(2) and 23(b)(3), on behalf of the following class (the "Class"):

Any person in the United States who paid a subscription fee to Netflix to rent DVDs at any time from at least May 19, 2005 to the

present.

The Class specifically excludes Defendants; their officers, directors or employees; their subsidiaries, affiliates, or any other entity over which they have a controlling interest; any co-conspirators; and any affiliate, legal representative, heir, or assign of any Defendant; any federal, state or local governmental entities; any judicial officer presiding over this action and the members of his/her immediate family and the judicial staff; and juror assigned to this action.

43. The members of the Class are so numerous and geographically dispersed across the country that joinder of all members of the Class would be impracticable. Due to the nature of the claims asserted here, Plaintiff believes that members of the Class are located throughout the United States. The exact number of Class members is unknown to Plaintiff at this time, but Plaintiff believes that the Class is in the millions and their identities can only be discovered through inspection of Defendants' records, which are or should be readily available.

44. Plaintiff's claims are typical of the claims of the Class in that Plaintiff and all members of the Class were damages by the same wrongful conduct of Defendants alleged herein. Plaintiff and the Class paid a subscription fee to Netflix directly, which was artificially maintained at non-competitive prices established by the actions of Defendants in connection with the wrongful conduct alleged herein.

45. Plaintiff will fairly and adequately protect the interests of the Class. The interests of Plaintiff are coincident with, and not antagonistic to, those of the Class. In addition, Plaintiff is represented by counsel who is experienced and competent in the prosecution of complex class action antitrust litigation.

46. Numerous questions of law and fact that are common to the Class arise from Defendants' anti-competitive conduct. Among those common questions of law and fact are:

a. Whether Defendants engaged in a contract, combination or conspiracy among themselves and/or their co-conspirators to allocate markets;

b. Whether Defendants unreasonably restrained trade in the Online DVD Rental Market;

c. Whether Defendants intended for Netflix to monopolize the Online DVD Rental Market;

d. Whether the alleged contract, combination and conspiracy violated Section 1 of the Sherman Act;

e. Whether the alleged contract, combination and conspiracy violated Section 2 of the Sherman Act;

f. Whether Defendants have acted or refused to act on grounds generally applicable to the Class;

g. Whether Defendants' conduct caused Netflix subscription fees to be higher than they otherwise would have been and thereby caused injury to the Plaintiff and other members of the Class; and

h. What is the appropriate measure of damages sustained by Plaintiff and other members of the Class.

47. These common questions of law and fact are common to the Class, and predominate over any other questions affecting only individual Class members.

48. This class action is superior to the alternatives, if any, for the fair and efficient adjudication of this controversy.

49. Prosecution of separate actions by individual Class members would create the risk of inconsistent or varying adjudications, establishing incompatible standards of conduct for the Defendants.

50. Injunctive relief is appropriate as to the Class as a whole because Defendants have acted or refused to act on grounds generally applicable to the Class.

FIRST CAUSE OF ACTION

Illegal Market Allocation In Restraint of Trade
In Violation of the Sherman Act, 15 U.S.C. § 1
(Against All Defendants)

51. Plaintiff re-alleges and incorporates by reference each and every allegation set forth in paragraphs 1-50 above as though fully set forth in this cause of action.

52. Defendants have entered into a *per se* illegal Market Allocation Agreement in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1. Even if evaluated under the rule of reason, the Agreement is an unreasonable restrain of trade in violation of Section 1 of the Sherman

Antitrust Act, 15 U.S.C. § 1.

53. Up until the time of the Agreement, Netflix and Walmart.com were competitors in the Online DVD Rental Market. In addition, Netflix was a potential competitor to Wal-Mart Stores and Walmart.com in the new DVD sales market. Netflix had the means and economic incentive to sell new DVDs in the absence of the Agreement.

54. Defendants shared a conscious commitment to a scheme designed to achieve the unlawful objective of dividing the markets for online DVD rentals and new DVD sales. The Agreement allocated the Online DVD Rental Market to Netflix, with Wal-Mart Stores and Walmart.com agreeing not to compete in that market. The Agreement also allocated new DVD sales to Wal-Mart Stores and Walmart.com, with Netflix agreeing not to sell new DVDs. Netflix also agreed to provide valuable promotional services for Wal-Mart Stores and Walmart.com. By doing so, Netflix provided significant consideration to Wal-Mart Stores and Walmart.com for their agreement to withdraw from, and not to compete in, the Online DVD Rental Market.

55. The Agreement created significant anti-competitive effects with no corresponding pro-competitive benefits. It eliminated competition in the relevant market, raising prices paid by customers. To the extent that there are any pro-competitive benefits at all resulting from the Agreement, they do not outweigh the Agreement's anti-competitive effects. Any pro-competitive effects could have been achieved by less restrictive means.

56. As a result of this violation of the law, Netflix's subscription prices charged to, and paid by, Plaintiff and the Class are, and have been, higher than they otherwise would have been.

57. As a direct and proximate result of Defendants' wrongful acts, Plaintiff and the Class have been injured in their business and property in an amount according to proof at trial, and are entitled to treble damages from Defendants pursuant to 15 U.S.C. § 15.

58. Plaintiff is informed and believes, and thereon alleges, that, Defendants, unless restrained, will continue with their conspiracy alleged above.

COUNT TWO
SHERMAN ACT SECTION 2 (15 U.S.C. § 2)
Monopolization of Online DVD Rental Market
(Against Netflix)

59. Plaintiff incorporates and re-alleges the allegations set forth in paragraphs 1-58 above,

as if fully set forth herein.

60. Section 2 of the Sherman Act, 15 U.S.C. § 2, prohibits the willful monopolization of any part of the trade or commerce among the states.

61. Netflix has monopoly power in the Online DVD Rental Market.

62. Netflix has willfully acquired and maintained its monopoly power in the Online DVD Rental Market by its acts and practices described herein, including by executing, implementing, and otherwise complying with the Agreement, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2.

63. As a result of the unlawful conduct alleged herein, Netflix's subscription prices charged to, and paid by, Plaintiff and the Class are, and have been, higher than they otherwise would have been.

COUNT THREE
SHERMAN ACT SECTION 2 (15 U.S.C. § 2)
Attempt to Monopolize Online DVD Rental Market
(Against Netflix)

64. Plaintiff incorporates and re-alleges the allegations set forth set forth in paragraphs 1-63 above, as if fully set forth herein.

65. If Netflix does not already have monopoly power, then Netflix has a dangerous probability of success in achieving monopoly power in the Online DVD Rental Market.

66. With the specific intent to achieve a monopoly, Netflix, by its acts and practices described herein, including by executing, implementing, and otherwise complying with the Agreement, has attempted to monopolize the Online DVD Rental Market, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2.

67. As a result of this violation of the law, Netflix's subscription prices charged to, and paid by, Plaintiff and the Class are, and have been, higher than they otherwise would have been.

COUNT FOUR
SHERMAN ACT SECTION TWO (15 U.S.C. § 2)
Conspiracy to Monopolize Online DVD Rental Market
(Against All Defendants)

68. Plaintiff incorporates and re-alleges the allegations set forth set forth in paragraphs

1-67 above as if fully set forth herein.

69. Defendants shared a conscious commitment to a common scheme designed to achieve the unlawful objective of the monopolization of the Online DVD Rental Market. Prior to and at the time of the Agreement, Netflix and Walmart.com were actual competitors in the Online DVD Rental Market. Defendants conspired with the specific intent, knowledge and purpose that their anti-competitive Agreement would result in Netflix wilfully acquiring and maintaining a monopoly in the Online DVD Rental Market. Wal-Mart Stores and Walmart.com knew that the natural and probably consequence of the Agreement would be the monopolization of the relevant market by Netflix. Defendants have committed over acts in furtherance of their conspiracy, including entering into, complying with, and implementing the Agreement, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2.

70. As a result of this violation of the law, Netflix's subscription prices charged to, and paid by Plaintiff and the Class are, and have been, higher than they otherwise would have been.

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays for judgment against defendants, and each of them, as follows:

1. For a declaration that this action is a proper class action under Federal Rules of Civil Procedure, Rule 23(b)(2) and (b)(3), on behalf of the Class as defined herein, and an Order directing that reasonable notice of this action, as provided by Federal Rule of Civil Procedure 23(c)(2), be given to each member of the Class;

2. For a declaration that the unlawful Market Allocation Agreement alleged herein is an unreasonable restraint of trade of commerce in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1;

3. For a declaration that Netflix has unlawfully monopolized the Online DVD Rental Market, or, in the alternative, for a declaration that Netflix has unlawfully attempted to monopolize the Online DVD Rental Market in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2;;

4. For a declaration that the Defendants have unlawfully conspired to monopolize the Online DVD Rental Market in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2;

5. For a preliminary and permanent injunction enjoining Defendants, and all persons

acting for, with, by, through, or under them, and each of them from further commission of the unlawful Market Allocation Agreement alleged herein;

6. For damages to plaintiff and the Class, and treble those damages under 15 U.S.C. § 15;

7. For all costs and expenses of suit of plaintiff and the Class, including reasonable attorney's fees; and

8. For such other and further relief as the Court may deem just and proper.

Dated: April 6, 2009

GROSS BELSKY ALONSO LLP

By:____________________

Adam C. Belsky

Attorneys for Plaintiff GABRIEL KRA
and the Proposed Class

JURY TRIAL DEMAND

Plaintiff hereby demands a trial by jury.

Dated: April 6, 2009

GROSS BELSKY ALONSO LLP

By:____________________

Adam C. Belsky

Attorneys for Plaintiff GABRIEL KRA
and the Proposed Class